# STATE OF MICHIGAN

# COURT OF APPEALS

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THOMAS J. TAYLOR,

Plaintiff-Appellant,

v

FIRST OF AMERICA BANK, N.A., n/k/a NATIONAL CITY BANK,

Defendant-Appellee.

and

K & M BOATING CENTER, INC., and CHRIS-CRAFT BOATS, INC.

Defendants.

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UNPUBLISHED
February 15, 2005

No. 249613
Genesee Circuit Court
LC No. 01-070398-CP

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals by right the grant of summary disposition in favor of defendant, First of America Bank, now known as National City Bank (the Bank). Plaintiff alleges breach of warranty and violation of the Michigan Consumer Protection Act (MCPA). We affirm.

Plaintiff first asserts the trial court erred in dismissing his claims for breach of implied and express warranty. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts." *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is sufficient factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion under subsection (C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the non-moving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The motion is properly granted when the affidavits or other proofs

show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiff contends that the language Chris-Craft uses in a brochure he obtained when he purchased a boat in 1995, two years before he purchased the boat at issue in this litigation, constitutes an implied warranty of merchantability. But the brochure contained merely promotional information, which expounds on the quality of the hulls of Chris-Craft watercraft, was not a part of this transaction. Its statements cannot substantiate, by either content or context, plaintiff's claim of an implied warranty; plaintiff acknowledged the brochure had nothing to do with his purchase of the boat at issue in August 1997.

Plaintiff also contends statements by K & M's salesman that the boat he purchased was still under the manufacturer's warranties created an express warranty pursuant to MCL 440.2313. But a salesman's general expression of opinion about a used machine to a knowledgeable buyer will not create an express warranty. *McGhee v GMC Truck & Coach Division*, 98 Mich App 495, 501; 296 NW2d 286 (1980). Further, the disclaimer language on the invoice negates the salesman's statements.

We also find that the statute of limitations precludes plaintiff's warranty claims. The Uniform Commercial Code provides that an action for breach of warranty accrues at tender of delivery, unless the warranty specifically indicates it extends to future performance. MCL 440.2725(2). So, plaintiff was required to initiate his action within four years of tender of delivery. MCL 440.2725(1). Plaintiff asserts this four-year period commenced on his receipt of the watercraft. But, because the boat was used, tender of delivery occurred for UCC analysis when the boat was delivered to its first owner on August 31, 1996, making plaintiff's claim untimely. This reading is consistent not only with the language of the statute inferring the initial tender of delivery of an item into the "stream of commerce" as the accrual date for initiation of the limitation period, but is also logical, as noted in prior case law recognizing that:

> "This policy consideration[1] underlying §2-725 makes it acceptable to bar . . . warranty claims brought more than a specified number of years after the sale; otherwise merchants could be forever liable for breach of warranty on any goods which they sold." [*Snyder v Boston Whaler, Inc*, 892 F Supp 955, 959 (WD Mich, 1994), quoting *Standard Alliance Industries, Inc v Black Clawson Co*, 587 F2d 813, 820 (CA 6, 1978).]

Plaintiff's assertion that the warranty applies or extends to future performance is incorrect. A warranty is deemed to extend to future performance when the warranty language explicitly provides that the subject goods will be free from defects for an identified period of time. *Snyder, supra* at 958. Here, plaintiff provides no written warranty or indication that either K & M or

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[1] Apparently, the underlying policy consideration is to provide, in the absence of an explicit agreement, "a reasonable period of time, four years, beyond which business persons need not worry about stale warranty claims." *Standard Alliance, supra* at 820.

Chris-Craft indicated the watercraft would be free of defect. The language plaintiff relies on within the Chris-Craft brochure cannot be used to assert the warranty extended to future performance as the statements within the brochure identified no extension to a future performance date. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002).

Next, plaintiff asserts that the trial court erred in dismissing his claim of revocation. As revocation is a remedy for breach of warranty, if there is a determination that no warranty was breached or that the warranty was effectively disclaimed, there exists no right that revocation can serve to remedy. Furthermore, MCL 440.2608 governs the acceptance and revocation of goods. The issue is whether plaintiff actually or effectively revoked acceptance of the boat, did so within a reasonable time frame and prior to any substantial change in condition. Whether a buyer revokes acceptance within a reasonable time after discovery of the nonconformity of the goods is dependent upon the particular circumstances of the case. *Leila Hospital and Health Center v Xonics Medical Systems, Inc*, 948 F2d 271, 276-277 (CA 6, 1991). The letter relied upon by plaintiff to evidence his revocation of the boat is insufficient. The letter plaintiff relies on contains no explicit or implied notice of revocation. Plaintiff acknowledged that he never communicated with the Bank asserting revocation. Indeed, plaintiff has presented no evidence that he ever notified any of the defendants that he was revoking acceptance. Revocation of acceptance is not effective until the buyer notifies the seller of it. MCL 440.2608(2).

Plaintiff next contends the trial court erred in dismissing his claims under the MCPA. While plaintiff identifies the subsections of the act allegedly violated, he provides no evidence or even discussion of how any of the defendants violated the act. A party abandons an allegation of error by failing to adequately brief its merits. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Plaintiff's assertion that the Bank, as a holder under the retail installment sales contract, is subject to all of his claims and defenses arising out of the underlying transaction and is liable for violations of the MCPA by defendants is rendered moot by the failure of plaintiff to substantiate his claims for breach of warranty or violation of the MCPA.

Last, plaintiff asserts that the trial court erred in failing to grant him summary disposition pursuant to MCR 2.116(I)(2). By definition, the grant of summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) and (C)(10), precludes entry of a judgment in favor of plaintiff.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Donald S. Owens